Hobson Bearing International, Inc. *and* Tera Lopez.
Case 14–CA–156114

May 11, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On August 19, 2016, Administrative Law Judge Christine E. Dibble issued the attached decision, and on August 24, 2016, she issued an Errata. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

[1] The Respondent has excepted to the judge's findings (i) that the Respondent coercively interrogated employee Tera Lopez on July 8, 2015; (ii) that Lopez' termination was motivated by her contact with the Board; (iii) that the Respondent's proffered reasons for terminating Lopez were pretextual; (iv) that Lopez was not a supervisor under Sec. 2(11) of the Act; (v) that the judge did not properly weigh evidence regarding Lopez' alleged supervisory authority; and (vi) that the judge committed prejudicial error by failing to order production of a cell phone containing a recording of the alleged interrogation. There are no exceptions to the judge's remaining findings.

Chairman Miscimarra recognizes that there were no exceptions to the judge's finding that employee Lopez engaged in protected concerted activity on July 8, 2015, during her meeting with the Respondent's owner and president, Gene Hobson. Nonetheless, he does not rely on the judge's finding that Lopez' conduct was "inherently concerted," a theory he rejects for the reasons set forth in his separate opinions in *Hoodview Vending Co.*, 362 NLRB No. 81, slip op. at 5–7 (2015) (Member Miscimarra, dissenting), and *Alternative Energy Applications, Inc.*, 361 NLRB No. 139, slip op. at 7–8 (2014) (Member Miscimarra, dissenting in part). As he explained in *Hoodview Vending*, the notion that conversations about certain subjects are "inherently" concerted cannot be reconciled with *Meyers Industries*, *Inc.,* 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). In *Meyers II*, the Board distinguished between conversations that look toward group action, which are concerted, and mere griping, which is not. To deem a conversation "inherently" concerted based solely on its subject matter erases this distinction and thus contravenes *Meyers II*. See *Hoodview Vending*, 362 NLRB No. 81, slip op. at 5–6 (Member Miscimarra, dissenting). Instead, he finds that Lopez' conduct on July 8 was concerted under the standard set forth in *Meyers II*. As relevant here, the Board in *Meyers II* held that an individual employee engages in concerted activity when he or she brings "truly group complaints to the attention of management." 281 NLRB at 887. That is what Lopez did on July 8 when she brought employees' concerns about the Respondent's workplace policies—including its ban on discussing pay—to Hobson's attention.

In affirming the judge's findings, we do not rely on her citations to several cases decided by a two-member Board: *Brighton Retail, Inc.*, 354 NLRB 441 (2009); *Inn at Fox Hollow*, 352 NLRB 1072 (2008); *Bloomfield Health Care Center*, 352 NLRB 252 (2008); *Bryant Health Center, Inc.*, 353 NLRB 739 (2009); and *Saigon Gourmet Restaurant, Inc.*, 353 NLRB 1063 (2009). See *New Process Steel v. NLRB*, 560 U.S. 674 (2010) (holding that following a delegation of the Board's powers to a three-member group, two members may not continue to exercise that delegated authority once the group's—and the Board's—membership falls to two). We also do not rely on the judge's citations to *Fresh & Easy Neighborhood Market, Inc.*, 358 NLRB 537 (2012); *Temecula Mechanical, Inc.*, 358 NLRB 1225 (2012); and *Taylor Made Transportation Services, Inc.*, 358 NLRB 427 (2012). These decisions were issued by panels subsequently found invalid by *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). The judge also cited *Relco Locomotives, Inc.*, 358 NLRB 298 (2012), and *Flex Frac Logistics, LLC*, 358 NLRB 1131 (2012), cases also decided by a panel that included invalidly appointed Board members. See *Noel Canning*, supra. However, prior to the issuance of the Supreme Court's decision in *Noel Canning*, the United States Court of Appeals for the Eighth Circuit and Fifth Circuit, respectively, enforced the Board's Orders—see *NLRB v. Relco Locomotives, Inc.*, 734 F.3d 764 (8th Cir. 2013); *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205 (5th Cir. 2014)—and there is no question regarding the validity of those courts' judgments.

In affirming the judge's finding that the Respondent failed to show that Lopez was a supervisor under Sec. 2(11) of the Act, we do not rely on the judge's characterization of the Board's decision in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), as holding that, in all Sec. 2(11) inquiries, "the evidence must show that a presumed supervisor is accountable for a subordinate's work performance." Accountability is relevant to determining whether an individual is a statutory supervisor only where a party contends that the individual possesses authority responsibly to direct employees. Id. at 691–692. The Respondent contends that Lopez was a statutory supervisor, but not on the basis that she responsibly directed employees. Chairman Miscimarra additionally notes that the judge's finding that Lopez was not a statutory supervisor is consistent with the three "common sense" factors set forth in his dissenting opinion in *Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 10 (2015) (Member Miscimarra, dissenting) (stating that, when applying the supervisory criteria set forth in Sec. 2(11), the Board should consider (i) the nature of the employer's operations; (ii) the work performed by undisputed statutory employees; and (iii) whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute). Here, it is plausible to conclude that all supervisory authority could be exclusively vested in Respondent's president, Hobson, given that the Respondent is in the business of importing and reselling industrial bearings to commercial customers, the work performed by undisputed statutory employees does not require much direction, and the Respondent's work force is comprised of only five statutory employees.

In adopting the judge's finding that the Respondent's discharge of Lopez was unlawful, we do not rely on the judge's characterization of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), as placing a burden of "production" on the employer. Rather, as the judge correctly stated elsewhere in her decision, once the General Counsel has shown that conduct protected by Sec. 7 of the Act was a motivating factor in an adverse employment action, the burden shifts to the employer to *show*—i.e., to prove—that it would have taken the same action even in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1089. In finding that the Respondent failed to satisfy its rebuttal burden under *Wright Line*, the judge properly considered evidence related to the Respondent's intent (i.e., the suspicious timing of the discharge). See *Dish Network, LLC*, 363 NLRB No. 141, slip op. at 1 fn. 1 (2016).

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(4) and (1) by discharging employee Tera Lopez, we shall order the Respondent to offer her full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall also order the Respondent to compensate Lopez for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).[3]

Within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, the Respondent shall file its report allocating Lopez' backpay with the Regional Director, not with the Social Security Administration. The Respondent will be required to allocate backpay to the appropriate calendar years. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Finally, the Respondent shall be required to remove from its files any and all references to the unlawful discharge of Lopez, and to notify her in writing that this has been done and that the discharge will not be used against her in any way.

ORDER

Hobson Bearing International, Inc., Diamond, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, maintaining, and/or distributing a "Pay" policy prohibiting employees from discussing their wages and bonuses with other employees.

(b) Promulgating, maintaining, and/or distributing an "Agreement of Restriction/Confidentiality" policy prohibiting employees from discussing or sharing "individual proprietary information; vital company information; and our information."

(c) Telling employees they are required to sign the unlawful policies described above in paragraphs 1(a) and 1(b).

(d) Prohibiting employees from discussing their wages and other terms and conditions of employment, including disciplinary issues.

(e) Prohibiting employees from discussing the discharge of an employee.

(f) Coercively interrogating employees about their protected concerted activities.

(g) Coercively interrogating employees about their statements to the Board regarding the legality of the Respondent's policies described above in paragraphs 1(a) and 1(b).

(h) Threatening to discharge employees for discussing their wages and other terms and conditions of employment.

(i) Discharging or otherwise discriminating against employees for engaging in protected concerted activities.

(j) Discharging or otherwise discriminating against employees for seeking access to the Board, filing charges, or giving testimony under the Act.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the "Pay" and "Agreement of Restriction/Confidentiality" policies, or revise them to make clear they do not prohibit employees from discussing their wages or other terms and conditions of their employment.

Chairman Miscimarra agrees with his colleagues that the Respondent unlawfully discharged Lopez. Unlike the judge, however, he does not rely on the "suspicious timing" of the discharge in determining that the Respondent failed to prove that it would have discharged Lopez even absent her NLRA-protected activity. Suspicious timing is probative at stage one of a *Wright Line* analysis, when the Board is determining whether the General Counsel satisfied his burden to prove that NLRA-protected activity was a motivating factor in the employer's adverse employment decision. But as Chairman Miscimarra has previously explained, he is of the view that it is improper to rely yet again on evidence of unlawful motivation, relevant at stage one of the *Wright Line* analysis, to find that the employer failed to satisfy its defense burden at stage two of the *Wright Line* analysis. To do so is to double-count *Wright Line* stage one and to eliminate *Wright Line* stage two. See *Dish Network, LLC*, supra, slip op. at 4–6 (Member Miscimarra, concurring).

[2] We shall modify the judge's recommended remedy and Order to reflect the Board's standard remedies and remedial language for the violations found, and we shall substitute a new notice to conform to the language in the Order as modified.

[3] For the reasons stated in his separate opinion in *King Soopers*, supra, slip op. at 12–16, Chairman Miscimarra would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

(b) Notify all employees at its Diamond, Missouri facility that the "Pay" and "Agreement of Restriction/Confidentiality" policies have been rescinded or revised.

(c) Within 14 days from the date of this Order, offer Tera Lopez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Make Tera Lopez whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(e) Compensate Tera Lopez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(f) Within 14 days from the date of this Order, remove from its files any reference to Tera Lopez' discharge, and within 3 days thereafter, notify Lopez in writing that this has been done and that the discharge will not be used against her in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Diamond, Missouri facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 16, 2015.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 11, 2017

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Philip A. Miscimarra, Chairman

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate, maintain, or distribute a "Pay" policy prohibiting employees from discussing their wages and bonuses.

[4] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT promulgate, maintain, or distribute an "Agreement of Restriction/Confidentiality" policy that prohibits employees from discussing or sharing "individual proprietary information; vital company information; and our information."

WE WILL NOT require you to sign unlawful policies prohibiting you from discussing your terms and conditions of employment.

WE WILL NOT prohibit you from discussing your terms and conditions of employment, including wages and disciplinary issues.

WE WILL NOT prohibit you from discussing the discharge of an employee.

WE WILL NOT interrogate you about your protected concerted activities or about statements you make to agents of the Board.

WE WILL NOT threaten to discharge or take other adverse actions against you for engaging in protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in protected concerted activities, for seeking access to the Board, for filing charges, or for giving testimony under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unlawful "Pay" and "Agreement of Restriction/Confidentiality" policy provisions or revise them to make clear that they do not prohibit our employees from discussing their wages or other terms and conditions of their employment, and WE WILL notify all employees that the policy provisions have been rescinded or revised.

WE WILL, within 14 days from the date of the Board's Order, offer Tera Lopez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Tera Lopez whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest, and WE WILL also make Lopez whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Tera Lopez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s) for Tera Lopez.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Tera Lopez, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

HOBSON BEARING INTERNATIONAL, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/14–CA–156114 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

William F. LeMaster, Esq., for the General Counsel.
Karl W. Blanchard, Jr., Esq. and *David J. Riesenmy, Esq.,* for the Respondent.
Eric Crinnian, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried in Joplin, Missouri, on December 15–16, 2015. Tera Lopez (Lopez/Charging Party) filed the charge in case number 14–CA–156114 on July 6, 2015.[1] The amended charge in this case was filed by Lopez on September 22. The General Counsel issued the complaint and notice of hearing on September 28. Hobson Bearing International, Inc. (Respondent/HBI) filed a timely answer on October 9.

The complaint alleges that the Respondent violated Sections 8(a)(1) and (4) of the National Labor Relations Act (NLRA/the Act) when:

1. Since about January 16, Respondent has maintained, and since about July 6, reissued and has maintained an unlawful rule prohibiting employees from discussing their pay and, or bonuses with the threat of termination for violating the rule.
2. About July 6, Respondent, by physical distribution to employees, promulgated and since then has maintained a rule titled Agreement of Restriction/Confidentiality, restricting employees from discussing or sharing confidential information, defined as including, but not limited to, individuals' proprietary information; vital company information; and our information.
3. Respondent, by Gene Hobson, at Respondent's facility:

[1] All dates are in 2015 unless otherwise indicated.

-About mid-June 2015, prohibited employees from discussing their terms and conditions of employment, including disciplinary issues.

-About July 6, 2015, told employees that they were required to sign agreements to abide by the rules described above in numbers 1 and 2 of the statement of the case.

-About July 8, 2015, prohibited employees from discussing their wages and other terms and conditions of employment.

-About July 8, 2015, interrogated employees about their protected, concerted activities, by asking employees if they had complained about the rules described above in numbers 1 and 2 of the statement of the case.

-About July 8, 2015, interrogated employees about their protected, concerted activities, by asking employees about conversations they had with agents of the Board regarding Respondent's rules described above in paragraph 4.

-About July 8, 2015, threatened employees with unspecified reprisals for engaging in Section 7 activity, including discussing their wages and other terms and conditions of employment.

-About July 8, 2015, threatened employees with unspecified reprisals for seeking access to the Board.

-About July 9, 2015, prohibited employees from discussing their wages and other terms and conditions of employment.

-About July 9, 2015, told employees that they were required to sign agreements to abide by the rules described above in numbers 1 and 2 of the Statement of the Case.

-About July 13, 2015, prohibited employees from discussing their wages and other terms and conditions of employment.

-About July 13, 2015, told employees that Respondent terminated an employee because the employee raised concerns about Respondent's rules described above in numbers 1 and 2 of the Statement of the Case.

-About July 13, 2015, threatened to terminate employees for discussing their wages and other terms and conditions of employment.

-About July 13, 2015, prohibited employees from discussing the termination of an employee.

4. About July 13, 2015, Respondent discharged Lopez because Lopez engaged in concerted conduct, and to discourage employees from engaging in these or other concerted activities. Alternatively, in the event that Lopez is found to be a supervisor of Respondent within the meaning of Section 2(11) of the Act, or found not to be an employee within the meaning of Section 2(3) of the Act, Respondent engaged in the conduct described above because Lopez attempted to prevent Respondent from restricting or interfering with employees' Section 7 rights, pursuant to the rules as described above in paragraph 4, and to chill employees' exercise of their Section 7 rights; and because Lopez contacted the Board regarding Respondent's rules set out above in paragraph 4.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is engaged in the importation and nonretail sale of industrial bearings. Its operations are conducted from its office and place of business in Diamond, Missouri. During the 12-month period ending August 31, Respondent sold and shipped from its Diamond, Missouri facility goods valued in excess of $50,000 directly to points outside of the State of Missouri. In conducting its operations during the 12-month period ending August 31, Respondent purchased and received at its facility in Diamond, Missouri goods valued in excess of $50,000 directly from points outside of the State of Missouri. Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operation and Managerial Staff

Gene Hobson (Hobson) founded Respondent in 1996 in Diamond, Missouri.[2] He is Respondent's founder, owner and President.[3] Respondent's business mission is the importation and resell of industrial bearings to commercial customers. Regal Beloit Corporation (RBC) is Respondent's largest customer, comprising 90 percent of its business. Respondent contracts with various overseas vendors to fill its customers' supply needs. During the period at issue, however, MOS was its primary supplier.

During the relevant time period, Respondent employed at its Diamond, Missouri facility about six people, including Hobson. The staff comprised: Hobson, President; Tera Lopez (Lopez), Project/Operations Manager; Shelly Wishon (Wishon), Front Office Manager; Halle Hobson (Halle),[4] Administrative Specialist; Michael McBride (McBride), Quality Control; Monty Greenwood (Greenwood), Warehouse/Shipping Manager.[5] Respondent also periodically hires contract (temporary) employees to assist with special projects. Former employees included: Manny Maturino's (Maturino) employment ended in late 2014; Rick Halverson's (Halverson) employment ended in 2013; Tracy Greenwood (Tracy) employment ended in 2014; Shawn McBride (Shawn) employment ended in 2014; and Scott Eastman (Eastman) employment ended in 2015. Respondent also employed for an unknown period of time an unnamed employee who suffered from a heart condition. Lopez and McBride tried to persuade Hobson to terminate the employee

[2] Respondent's facility is a building that contains a front office lobby with a hallway to the left that leads to offices. There is also a testing laboratory next to the lobby. On the right of the lobby is a staircase that leads to Hobson's office and conference room. Straight ahead and through the lobby is a large warehouse.

[3] Hobson also owns a cattle ranch near the HBI facility in Diamond, Missouri. Hobson is solely responsible for hiring the ranch's employees, which currently consists of staff members Cole Frossard (Frossard) and Shawn Hobson (Shawn).

[4] Halle Hobson is Hobson's daughter.

[5] McBride is a part-time employee.

because of possible liability due to his heart condition, but there is no evidence of when or whether he was terminated.

B. Company Policies Parts A and B

Since about July 6, Respondent has maintained company policies that address various terms and conditions of employment. Company policy part A (part A) addresses pay policies concerning holiday pay, vacation pay, bereavement pay, and part-time personnel pay. Company policy part B (part B) sets out the discipline for personnel infractions. Part B reads in pertinent part,

> Pay: Will be distributed every Thursday, You should not expect your weekly pay before 4:00 pm. Employees should not discuss their pay with any other employee, as it is a sensitive issue. Bonuses will be issued based on merit or performance. If someone receives a bonus or pay increase and shares their information with another employee and it is brought to my attention, it will be automatic termination. Pay is set, based on performance, annual increases, or a management's decision. No one is to discuss this issue at any time, other than in my office during a review. If you want to discuss pay, you must ask for a private meeting with management.

(GC Exh. 4.) This policy was a revision of prior part B policies which contained identical language to that set forth above and addressed the same subjects and infractions. (GC Exh. 3.) The prior part B policies were revised on November 26, 2012, and February 5, 2014.

Company policy part B also set forth the procedure employees had to use if they were late to or absent from work. The provision addressing "tardies" and absences from work applies to all employees. In addition, about a year prior to Lopez' termination, Hobson informed employees in a meeting that if they were going to be late or absent from work, Wishon should be notified by telephone or text message by 9 a.m. on the date.[6]

The February 5, 2014, revision remained in effect until part B dated July 6, was distributed to employees at a meeting held on July 6.[7] The evidence also shows that in the past, Respondent's employees had signed one or more of the revised policies.

C. Confidentiality Agreement

Respondent promulgated and maintained a confidentiality agreement (CA) that restricted employees from divulging, among other information, "individual proprietary information; vital company information; and our information." (GC Exh. 1-I, 5.) The CA has been in effect since at least May; and on or about May 28, R distributed it to employees for their review and signature.

D. Mid-June 2015 Verbal Reprimand of McBride

About the same time that Respondent began revising and distributing to employees company policies and the CA, an incident occurred involving McBride and Hobson. McBride had been employed with Respondent on several occasions, most recently from March 2014, to July 22, 2015. In his position as the quality control manager he served as the point of contact for customers experiencing quality problems with their orders.

In a meeting about mid-June, Hobson expressed, to McBride, his concern that McBride had needlessly purchased "grease" without his authorization. After the meeting, McBride complained to other employees that Hobson "jumped him" and was "petty" towards him in a meeting. McBride also complained to other employees about Hobson hiring a contract employee that he felt was unnecessary. Subsequently, Hobson verbally reprimanded McBride for complaining to other employees about his managerial decisions, and told him to stop interfering with business operations by "stirring up drama with employees."

E. HBI Employee Meeting on July 6

On July 6, Hobson held a meeting with employees in his conference room. In attendance were Lopez, Wishon, McBride, Frossard, Halle, and Greenwood. The purpose of the meeting was for the employees to sign revised parts A and B and the CA. Hobson explained to the employees that after they reviewed and signed the revised policies and CA, he and Wishon would take their signed forms to have them notarized. He informed the employees that he wanted their forms signed that day. Wishon questioned whether it was legal to have the forms notarized without the employees present; and Hobson responded that his attorney informed him it was permissible.[8]

After the meeting, Lopez, Wishon, and McBride discussed the legality of the policies and the CA among themselves. They also complained about the change to the bereavement policy, sick pay, mobile phone usage in the office, and dress code.[9] Lopez told them she thought that certain language in the company policies (parts A and B) and the CA might be illegal. She also informed them that she was going to research the issues and discuss them with Hobson at her meeting with him on July 8. Despite their concerns, the employees decided to sign parts A and B and the CA to avoid upsetting Hobson.[10]

Subsequently, Lopez researched the issue via the internet and called the NLRB for guidance.[11] She understood the NLRB representative to say that the provision prohibiting the discussion of their pay and certain portions of the CA were unlawful. Lopez relayed this information to her coworkers, assuring them that she would discuss it with Hobson the following day.

F. Meeting between Hobson and Lopez on July 8

On July 8, Hobson met with Lopez in the conference room to discuss, among other items, business operations and her per-

[6] Hobson denied Wishon's testimony on this point. However, later in the decision, I detail why I credit Wishon's testimony instead of Hobson on this point.

[7] The changes made to part B dated July 6 included, among other changes, reducing paid holiday from 8 days to 7 days; and reducing bereavement pay for a grandparent from 3 days to 1 day.

[8] The record is devoid of evidence establishing whether Hobson and Wishon took those forms to be notarized.

[9] Wishon provided undisputed testimony that at some point in their discussion, Halle also stopped and expressed her displeasure with the dress code policy change. (Tr. 215.)

[10] Wishon had signed past company policies banning the discussion of employee pay.

[11] Lopez also contacted the Department of Labor (DOL) Occupational Safety and Health Administration (OSHA), and the Equal Employment Opportunity Commission (EEOC) about the same or similar issues. Ultimately, she filed complaints with those agencies.

formance evaluation. The meeting began with a discussion on "forecasting"[12] that lasted until about 1:30 p.m., when they broke for lunch. They returned from lunch about 4 p.m. to continue the meeting. The first 15 minutes of the meeting was used to finish talking about the company forecasting trends. Once discussion about business operations ended, Lopez broached her concerns about the legality of parts A and B and the CA. She also voiced her objections to the changes to the bereavement, vacation accrual, dress code, and sick pay policies and Halle's chronic tardiness. Some of her complaints were of a personal nature. For example, she complained about the effect the revision to the sick leave policy had on her. Hobson assured Lopez that it was not personally directed at her; and it should not be a concern to her because she was a salaried employee. Nonetheless, the primary focus of their conversation was on those issues that she spoke about with her coworkers after the employee meeting on July 6. Lopez told Hobson that she did not want to sign the policy prohibiting employees from discussing their pay with each other, but he responded that she and none of the other employees were supposed to talk about their pay. Lopez told him the policy violated federal law and provided him with information she got from the internet corroborating her position. Hobson countered that she could draw a line through the portion of the policy she found objectionable. Although he told her it did not matter to him if she wanted to discuss her pay with other employees, Hobson immediately repudiated this sentiment by stating,

> . . . all it does is stir the pot and create drama, okay? And cause Obama signed some, some shit into law, ah, this is something that, that my lawyer would need to, to investigate and to uh, see what it actually is and the Labor Relations Board if they have a problem with it can give me a call and ask and tell me about it because just because it refers to this section, that section. I don't know if this is law.

(GC Exh. 12; GC Exh. 13, Part 1 p. 8.) Lopez also informed Hobson that the CA was unlawful because it imposed a monetary penalty for violating its provisions. Nonetheless, Hobson told her that she was ignorant of the law, and he was going to enforce its provisions. In response to her complaint that she was discouraging him from bringing these concerns to him, Hobson denied it. He also questioned whether she had talked about her objections to the parts A and B and the CA with her coworkers, and instructed her not to discuss her belief that he was "breaking the law" with other employees. (GC 12; GC Exh. 13, Part 1 p. 9.) The following exchange ensued:

> Hobson: I'm not discouraging you from doing it. I want you to do it but I don't want you to be discussing it with other employees.
>
> Lopez: So, do you want me to go, "hey…"
>
> Hobson: Are you discussing it with other employees?
>
> Lopez: "Hey, he's violating the law"
>
> Hobson: Did you talk to me only about that or did you bring it up to other employees…

Id. Hobson continued by telling Lopez that if she objected to the provision, she could "line through it." However, he immediately disavowed the statement by emphasizing to her that she was "going to sign a confidentiality if you work here and that's, that's going to be required" but agreed to have his attorney review it again to ensure its legality. (GC Exh. 12; GC Exh. 13, Part 1, p. 9.)

The next item that Hobson and Lopez debated was her unhappiness with his daughter's (Halle) tardiness and her conflicts with his wife. Hobson told her that because Halle was a student, she needed flexibility with her work scheduled, and Lopez would have to accept it. He also informed her that she needed to make more of an effort to get along with his wife and that he had told his wife the same.

Hobson and Lopez revisited the subject of the legality of parts A and B and the CA. Lopez told him that she called the "Labor Board" and EEOC.[13] Although she had just informed him that she called the Board and EEOC, he inexplicably asked if she called the Board on Respondent, what she reported, and the Board's response. Lopez again admitted to calling NLRB; relayed that the NLRB representative informed her that the CA and parts A and B were unlawful; and the NLRB representative asked if she wanted to file a complaint. Hobson responded that filing a claim was her right; and if she did not want to sign the company policies containing the pay provision, and the CA with a monetary fine for violating it, she could "scratch off of there." Lopez expressed skepticism noting he made employees feel pressured into signing the documents for fear of losing their jobs. She explained,

> Lopez: Just like the confidentiality, "Sign this." It's not, "take it home and read it over."
>
> Hobson: mmhmm
>
> Lopez: But I can't take it home, can I? Because…
>
> Hobson: Why can't you?
>
> Lopez: Your confidentiality thing says taking crap out I owe you $75,000.
>
> Hobson: No, I, I, got to put a fee on there. So, you talked to the Labor Board about that as well?
>
> Lopez: Yes
>
> Hobson: and what did the Labor Board say?
>
> Lopez: The said it's illegal.

(GC Exh. 12; GC Exh. 13, Part 1, p. 15.) Hobson then asked her to get a copy of the CA so they could review it; and she responded with sarcasm which caused him to express frustration stating,

> You're really, you're really pushing me. You're sitting here telling me, little, looking for little tidbits telling

[12] Forecasting is the term Respondent uses for estimating how much product a customer might order over several months and, based on that estimate and its current supply, the amount of product Respondent must stock at the warehouse to meet its customer's needs.

[13] Based on her testimony, it is apparent Lopez was referring to the NLRB and the Equal Employment Opportunity Commission (EEOC).

> me that you called the EEOC, the Department of Labor, all this. Why would you do that? Who does shit like that?

(GC Exh. 13, p. 16.) They then became locked in a battle over whether Hobson said Lopez was a "witch stirrer" brewing up brew or used some variant phrase to denote causing drama. At some point the discussion deteriorated into an unproductive argument with Hobson telling Lopez that she appeared intimidated by him, unhappy with her job, and she should find another job if she was not happy at the company. He accused her of being defiant and insubordinate; and he had been warned that she "would probably try and come against [him] and look for little things" (GC Exh. 12; GC Exh. 13, Part 1, p. 18) Lopez complained that he awarded employees bonuses unfairly. Hobson denied the accusation and told her his award of bonuses to employees was "not your business." Id. He reiterated that he was unhappy with her decision to complain to federal agencies about the parts A and B and the CA. Hobson told Lopez the he did not "appreciate you reporting things to me to the government." (GC Exh. 13, p. 17–20.)

The meeting continued with Lopez complaining about Hobson being upset with her because she told a RBC employee that he had instructed her not to send RBC reports on the status of their orders. Hobson accused her of purposely conveying the information to RBC in a manner that would cause friction with RBC. He also reminds her that she was not punished for the RBC incident, but instead would receive a raise as part of her annual performance evaluation.

However, Hobson accused her of being insubordinate, which she denied.[14] She circled back to the nonsensical argument about whether Hobson called her a witch stirring the pot. Frustrated Hobson asked, "What is it that you want? What is it you want, Tera? Do you want to continue your job here or do you want to leave. What do you want?" (GC Exh. 12; GC Exh. 13, Part 2, p. 3.) Lopez responds several times that she is bored with her job because her duties are taken from her and reassigned to other employees, thus leaving her without enough work to keep her busy.

Hobson and Lopez continue to circle around the same topics with no apparent resolution. Further into their repetitive discussion, Hobson again voices his displeasure about her reporting the company to the Department of Labor and EEOC; and notes that he has treated her fairly because she is the highest paid employee on the payroll. It should also be noted that at some point in their discussion and in his hearing testimony, Hobson characterized Lopez as a "stellar employee," "doing a good job," highly intelligent, and had a "wonderful" attitude with him. Likewise, the only performance appraisal for Lopez entered into the record lists several of her strong points but lists one area for improvement as, "[d]o not bring up personal complaints or problems in front of other [e]mployees." (GC Exh. 14.)

After more squabbling over the hostility between Lopez and Hobson's wife, they circle back to a discussion of her contacting the Board and the CA. Hobson reiterates that he mark through the provisions of the parts A and B and the CA that she found objectionable. Nevertheless, he reminded her that he was going to review the information he gave her about the CA's illegality. Hobson also recalled a mistake she made in sending an email to Respondent's supplier in China, MOS, which contained confidential information that could have resulted in serious damage to Respondent. She acknowledged her mistake; and he assured her that, although initially upset, he did not believe she sent the information to MOS with malicious intent. Towards the end of the meeting, Hobson told Lopez that he would have terminated her if he felt that she had sent the email to MOS in an attempt to purposely harm the company. Lopez accuses him of hypocrisy for discussing the MOS incident with other workers, but prohibiting her from doing the same. Hobson rejects her characterization, responding that he does not mind her talking with other employees when she is upset but not to talk to them about "business stuff."[15] They proceed to review the policies together and agree on the sections to delete. Notwithstanding this action, Hobson repeats that he will be unhappy if she discusses work related issues with coworkers; and again tells her that he is going to take the CA to his attorney to review it for legal accuracy, and regardless, all employees will be required to sign it.

Lopez reiterated that she was bored in her job. Hobson informed her that the only challenging position left in the company was sales and encouraged her to take on more of those responsibilities. He promised to support her in this effort. Explaining to Lopez that he was hiring an employee that she would train on bearings, he encouraged her to learn from him because this future employee had a vast knowledge of sales and the bearing's market. He also repeats his support of Lopez stating,

> ". . . I wouldn't keep you around her for a minute if I thought you were bad business. I didn't think you were bad business then and I don't think you are now and you know you can tell me stuff you can come against me on and I'll take it with a grain of salt cause truthfully and honestly I need, you know, I've been in your corner and I've been for you. So there is no need to worry about me."

(GC Exh. 12; GC Exh. 13, Part 3, p. 7.) The meeting finally ended at about 5 p.m. with Hobson assigning Lopez three sales calls purportedly in response to her request for more work and responsibility.

G. Hobson Meeting with Attorney on July 9

On July 9, Hobson called Wishon into his office to ask her if she felt the ban on employees discussing their pay among themselves was illegal. When she told him that she felt it prohibited employees from determining if they were being paid fairly, Hobson retrieved the document and told her he was going to change it and have employees to sign the revised ver-

[14] It was at this point in the meeting that Lopez informed Hobson she had been recording their conversations for the past 6 months, including the current discussion.

[15] Although Hobson denied on cross-examination telling Lopez she could not discuss business matters with other employees, the audio recorded evidence reveals he explicitly told her this several times during the course of their meeting.

sion.[16] Hobson informed Wishon that he was taking the documents to Respondent's attorney for review. At some unspecified point, Hobson posted a notice on the employee bulletin board that the offending provisions had been removed from the policies because they were inaccurate.[17]

On July 9, Hobson contacted Respondent's attorney, David Riesenmy (Riesenmy), for advice on the legality of the company's policies and the CA. He also consulted with Riesenmy on his desire to terminate Lopez' employment. Riesenmy advised him to rewrite the part B pay provision. There is no evidence what, if any, advice Riesenmy gave Hobson on his desire to fire Lopez. Subsequent to his meeting with Riesenmy, Hobson had the employees sign a revised version of the policies parts A and B and the CA.[18]

H. Lopez' Absence from Work on July 10

On July 10 about 9 a.m., Hobson asked Wishon if Lopez was in the office. She told him that Lopez was ill and unable to come to work. Hobson told her that because Lopez did not personally notify him of her absence he was going to "write her up" as a no call/no show. He presented the completed "write-up" to Wishon for her signature, but she refused to sign it. Consequently, Hobson told her to write whatever she wanted at the bottom of the form, but regardless, he was going to issue the "write-up." Wishon notated on the document that Lopez notified her the previous evening that she would be absent from work on July 10. Both testified that ultimately the "write-up" disappeared before it was issued to Lopez. It was never located. Subsequently, Hobson returned to Wishon's desk about 9:30 a.m. or 10 a.m. and told her that Lopez was fired.

Hobson's and Wishon's testimony of their discussion differs on almost every relevant point. Respondent has a written leave policy setting forth the disciplinary action that employees are subject to for violating its provision. (GC Exh. 4.) Hobson insists that since she became operations/project manager, Lopez has had to notify him if she was going to be absent or late to work. He insisted, however, that the remaining employees have the option of notifying him or Wishon if they are going to be late or absent from work. It is undisputed that employee notifications of unexpected late arrivals or absences have to be received by 9 a.m. on that morning. However, Wishon testified that the practice has been for employees, including Lopez, to contact her if they are going to be late to or absent from work. According to her, Hobson communicated this practice to employees in a meeting about a year ago. She noted that previously employees were required to notify Lopez if they were going to be late or absent, but she could not recall when the new procedure was put in place. Hobson insists that in response to his inquiry, Wishon first told him she had not heard from Lopez. According to him, it was not until after he placed a "write-up" for Lopez on her desk did Wishon tell him that Lopez told her the previous evening that she might not come to work because of "female problems." Wishon contradicts his testimony on this point, insisting when Hobson first asked she told him that Lopez informed her the previous evening that she would not be in to work because she was feeling ill.

I find Wishon more credible than Hobson regarding their conversation on July 10, about if and who Lopez notified that she would be absent. Notably, if Lopez was supposed to report her absences directly to Hobson and not Wishon then why would he need her to sign off on the "write-up?" Respondent failed to provide an answer to that question. Moreover, the "mysterious" disappearance of the write-up that Hobson placed on Wishon's desk further casts doubt on the veracity of his testimony on this point. The Board has consistently declared that the testimony of current employees is more likely than not to be reliable because the witness is testifying adverse to her or his pecuniary interest. *Gold Standard Enterprises, Inc*., 234 NLRB 618, 619 (1978), enf. denied on other grounds 607 F.2d 1208 (7th Cir. 1979), citing, e.g., *Georgia Rug Mill*, 131 NLRB 1304, 1305 (1961); *Gateway Transportation Co., Inc*., 193 NLRB 47, 48 (1971).

I. Respondent's Efforts to Hire a New Operations Manager

Hobson began reaching out to people about working for him in March. In April, Hobson contacted an acquaintance, Michael Norman (Norman), about working for Respondent. Hobson told Norman that if he accepted the position his duties would be "[c]ontrol over the operation, reporting only to [Hobson] all the day-to-day operations." (Tr. 230.) Norman was informed that someone was currently in the position. On May 21, Norman interviewed with Hobson and toured Respondent's facility. During the interview, Hobson told him that the person currently occupying the position, Lopez, was going to be demoted and her duties would be transferred to him. Hobson also warned him that there might be "friction" when Lopez learned of her demotion; and he was uncertain if she would want to remain employed at the company.

After his interview, Hobson contacted Norman by text to ask whether he was going to accept the position. In the text Hobson also wrote,

> Going to make some decisions quickly on hiring … May fire Tera soon … she was suppose (sic) to send my one supplier a small forecast and production schedule and she sent them a full inventory schedule of what we have and who are customers are and how much we get

(GC Exh. 7.) Norman declined the job because he and Respondent could not agree on a compensation package.

In April, Hobson unexpectedly encountered a former em-

[16] The document that Hobson revised in his meeting with Wishon is GC Exh. 4.

[17] Wishon testified that when he returned from meeting with Respondent's attorney, Hobson told her that he was advised that the provision banning employees from discussing their pay with each other only applied to federal employees so he was returning the provision to the policy. Lopez testified that Hobson also made similar statements to her. Each of the revised company policies in evidence contains the provision prohibiting employees from discussing their pay with each other with the threat of discipline for violations. (GC Exhs. 3, 4, 5, 6.) I credit her testimony on this point because it was corroborated by other witnesses and objective evidence.

[18] Wishon admitted that she signed another version of the policy that did not include the ban on discussing employee pay. However, the revised document that Wishon (and presumably other employees) signed is not in evidence.

ployee, Evan Tanner (Tanner), at the local mall.[19] He explained to Tanner that he wanted to hire someone because he was having "issues" with an employee. Subsequently, Hobson and Tanner had several telephone conversations in an attempt to schedule an in-person meeting. During several of these conversations, Hobson told Tanner about problems he was having with Lopez. The first week in June, Tanner met Hobson at Respondent's facility to discuss the position and his expected duties. During their meeting, Hobson explained that because of Lopez' insubordination he wanted her to train Tanner; and Tanner would then assume some of her responsibilities while Lopez would be demoted. Hobson also complained to Tanner that Lopez, McBride, and Wishon would socialize in the warehouse when they should have been working; and his issues with Lopez and her causing "drama" with other employees had continued too long. Tanner was offered the position at the meeting, but his start date was not established because Hobson had to prepare the paperwork finalizing the job offer; and Tanner had to give his current employer notice.[20] Hobson expressed to him that he was unsure about Lopez' role going forward in the company, but felt that she might voluntarily decide to leave once Tanner was hired and she was demoted.

On June 30, Tanner met with Hobson to review the job description and sign the job offer. Hobson also introduced Tanner to Respondent's work force. Tanner testified that in this meeting Hobson determined that Tanner would assume Lopez' position of operations manager, and Lopez would be fired. However, his Board affidavit contradicts this statement. In his statement to the Board, Tanner notes that there was uncertainty about what role Lopez would assume after his hire; and he could not recall if Hobson told him that he had spoken with Lopez about his plans for her position. (Tr. 105–106) I find Tanner's statement to the Board more credible and discount his testimony at the hearing on this point. His statement at the hearing was in clear contradiction to his sworn statement; and the statement to the Board was given closer in time to the act. Therefore, it is more probable than not that Tanner's memory of the event was more accurate at the time he gave his statement to the Board. Moreover, Tanner could not provide a reasonable or any explanation for the change in his testimony. Except for a text message sent from Hobson to Tanner scheduling a date for him to come into the office, Tanner and Hobson did not have any further contact until July 10. On July 10, Tanner received a text message from Hobson informing him that he was uncertain if Lopez would return to her job because she did not notify him or anyone else that she would not be at work that day.[21]

J. Lopez' Termination on July 13

On the morning of July 13, Hobson, Tanner, and McBride were together in the lobby when Lopez arrived for work. Hobson informed Lopez immediately when she entered the building that she was terminated. He told Lopez that Wishon would gather her personal items and deliver them to her. Lopez left without incident.

Subsequently, Hobson met with McBride and Tanner in the conference room to explain why he dismissed Lopez. He told them that Lopez was fired because she was insubordinate; and she had mistakenly sent company data to a customer. He testified to the examples of insubordination that Hobson accused Lopez of committing in the following exchange with counsel for the General Counsel:

> LeMaster: What was discussed in this meeting?
>
> McBride: He brought us up there and he said, "I had to let her go. She was being disrespectful."
>
> LeMaster: Ok. Did he say anything else?
>
> McBride: I asked why?
>
> LeMaster: Did he answer you?
>
> McBride: Yeah, he had an answer. He said it was over the e-mails sent to the MOS customer about some data and some cost problems they had.
>
> LeMaster: Okay. Did [Hobson] give any examples of [Lopez] being disrespectful?
>
> McBride: Yes
>
> LeMaster: What were those?
>
> McBride: He said one of the examples she was – besides the e-mail problem, and that she was always crossing her arms, and he said that is disrespectful to him.
>
> LeMaster: Did he give you any other examples?
>
> McBride: Yes. He had – oh, my mind just went blank.
>
> LeMaster: Take your time. Do you recall, was it anything that she said, that she did?
>
> McBride: Yeah, whenever things was brought up why he let her go, it was the data that she brought in just showed the legality, that we couldn't talk about our bonuses and raises, that was supposed to be legal, and she showed that where she got the information from, who she talked, to and where she got the information from.

(Tr. 195–196.) During their discussion, Hobson also explained to McBride that his lawyer had advised him that company rules banning employees from discussing their pay was only unlawful if applied to federal employees; and the information Lopez gave him on this topic was incorrect.

III. 8(A) (1) VIOLATIONS

Section 8(a)(1) of the National Labor Relations Act

[19] Tanner was briefly employed by Respondent in 1997.

[20] Tanner testified that he did not accept the job offer until about a week after the meeting. However, the affidavit that he gave to the Board attested that he accepted the job in the interview. Regardless, it is not necessary for me to reconcile the discrepancy because it is not important to the merits of the case.

[21] On direct-examination, Tanner testified that the first time Hobson told him that he was going to fire Lopez was June 3. However, his testimony is in direct contradiction to the affidavit he provided to the Board on August 17. I do not credit his testimony on this point because he provides no credible reason for the change in his recollection of the conversation he had with Hobson about when Hobson made a definitive decision to fire Lopez.

(NLRA/the Act) provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." See *Brighton Retail, Inc*., 354 NLRB 441, 441 (2009). An employer violates Section 8(a)(1) of the Act if it disciplines or discharges an employee for engaging in activity that is "concerted" within the meaning of Section 7 of the Act. If it is determined that the activity is concerted, a violation of Section 8(a)(1) will be found if the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action was motivated by the employee's protected, concerted activity. *Relco Locomotives, Inc.*, 358 NLRB 298 (2012) (citing *Meyers Industries*, *Inc.,* 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB* 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)). Once the General Counsel establishes such an initial showing of discrimination, the employer may present evidence, as an affirmative defense, showing it would have taken the same action even in the absence of the protected activity. The General Counsel may offer evidence that the employer's articulated reasons are pretext or false. *Relco,* supra. In addition, the Act also protects applicants for employment. *NLRB v. Town & Country Electric, Inc*., 516 U.S. 85, 87 (1995).

The Board has held that if a rule specifically restrains Section 7 rights, the rule is invalid. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See also *Waco, Inc*., 273 NLRB 746, 748 (1984) (work rule explicitly prohibits employees from discussing wages with coworkers a restriction on Section 7 rights). Even if the rule does not restrict specific Section 7 rights, it may still be unlawful if employees would reasonably interpret the rule to prohibit Section 7 activity. *Longs Drug Stores California, Inc*., 347 NLRB 500, 500–501 (2006); *Lutheran Heritage Village-Livonia*, supra at 647. In *Lutheran Heritage Village-Livonia*, 343 NLRB at 646, the Board stated, ". . . in determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." See also *Lafayette Park Hotel*, 326 NLRB 824, at 828 (1998) (citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992)).

The Board has established a framework for assessing whether an employer's confidentiality rule violates the Act. If the rule does not explicitly restrict Section 7 activities, then the fact-finder must analyze whether (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied "to restrict the exercise of Section 7 rights." *Hyundai America Shipping Agency*, *Inc.,* 357 NLRB 860, (2011); *Flex Frac Logistics, LLC,* 358 NLRB 1131, 1146 (2012), enfd. 746 F.3d 205 (5th Cir. 2014).

A. Respondent's Confidentiality Agreement is Unlawful

The General Counsel argues that Respondent's CA violates the Act because it contains vague and ambiguous provisions that "any reasonable employee would struggle to interpret the document or concretely identify what information is permitted to be discussed." (GC Br. 18.) The sections read in pertinent part:

> • (Employees)…will not exchange information with the Chinese manufacturers, new or future employers, bearing companies, users of such, distributors, users of such, and or individual's proprietary information. Regarding company information, prices, contacts, suppliers, manufacturers, customers any information to include methods of distribution.
>
> • (Employees)…will not copy vital company information and or remove or distribute this information or paperwork, from Hobson Bearing International (HBI), offices under no circumstance without written authorization (from Respondent)
>
> • (Employees)…will not…give our information to anyone without the written consent.
>
> • (Employees)…will not…share information obtained while working or no longer working at HOBSON BEARING INTERNATIONAL, Inc. With any outside entities whether related or indirectly related. (sic) (GC 5).

(GC Exh. 5.)

The General Counsel alleges the above provisions are invalid because the document does not explain or provide definitions to make clear the context of its prohibitions and restrictions. Moreover, the General Counsel argues that an employee who reads the CA would "reasonably interpret the document as encompassing protected activities and information, such as discussing their own wages [and] other terms and conditions of employment." (GC Br. 19.)

I find that Respondent's CA violates the Act because the relevant sections of the CA are so broadly written that it would chill employees in the exercise of their Section 7 rights. While I agree that employers have a legitimate interest in safeguarding their confidential and proprietary information, read without context, this CA could also be interpreted to preclude the disclosure and discussion of employee wages, disciplinary actions, performance appraisals, personnel documents, and other terms and conditions of employment. *Battle's Transportation, Inc*., 362 NLRB No. 17 (2015) (Board held employer's confidentiality agreement prohibiting employees from divulging "human resources related information" and "investigations by outside agencies" violated the Act.). The impromptu discussion Lopez, McBride, and Wishon held after the meeting on July 6 is evidence of their confusion about what information they were barred from disclosing under the CA. See *Hyundai*, supra at 12 fn. 12 (Board explained that in order to keep information confidential employers must "specifically define such information in a fashion that will clearly not include those matters that employees are entitled…to discuss among themselves and with interested third parties.") Moreover, Respondent "concedes NLRA violation with regard to portions of its Company Policy

and Confidentiality Agreement." (R. Br. 19.)[22] Respondent admits that its CA "was overbroad and has been abandoned by Respondent. Respondent agrees to cooperate with the NLRB in taking any further steps required." (R. Br. 12.)

Accordingly, I find the CA violates Section 8(a)(1) of the Act.

B. Ban Prohibiting Employees' Discussion of Pay Unlawful

The General Counsel argues that Respondent has maintained and reissued a rule that is facially invalid because it specifically prohibits employees from discussing their pay with any other employee and threatens them with termination if the rule is violated. The sections read in pertinent part:

> **Pay:** Will be distributed every Thursday. You should not expect your weekly pay check before 4:00 pm. Employees should not discuss their pay with any other employee, as it is a sensitive issue. Bonuses will be issued based on merit or performance. If someone receives a bonus or pay increase and shares their information with another employee and it is brought to my attention, it will be automatic termination. Pay is set, based on performance, annual increases, or at management's decision. No one is to discuss this issue at any time, other than in my office during a review. If you want to discuss pay, you must ask for a private meeting with management.

(GC Exh. 4.) Hobson acknowledged that since at least February 5, 2014, Respondent has maintained company policies prohibiting employees from discussing their pay with other employees; and a violation of the policies will result in termination. (Tr. 25–26; GC Exh. 3, 4.) More importantly, Respondent admits that its company policies restricting employees' ability to discuss their pay with other employees violates the Act. However, Respondent also argues that it has addressed "those issues" and "stands ready to take such other reasonable steps as directed by the NLRB." (R. Br. 19.)

I find that the provision at issue is unlawful on its face because it explicitly restricts employees' Section 7 right to discuss wage and, or salary information. The Board has consistently held that nondisclosure rules which ban the disclosure and discussion of wage and salary information are invalid. The plain language of the provision at issue explicitly bans employees from engaging in protected activity. *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004); *Bettie Page Clothing*, 359 NLRB 777 (2013), affd. 361 NLRB No. 79 (2014); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn. 3, 291 (1999). Based on the clear language of the rule, it is apparent that employees are required to address complaints about wages to the owner and president of Respondent, Hobson. This requirement, in combination with the threat of termination for failing to adhere to the rule, would "reasonably tend to inhibit employees from bringing wage-related complaints to, and seeking redress from, entities other than Respondent, and restrains the employees' Section 7 rights to engage in concerted activities for collective bargaining or other mutual aid or protection." *Kinder-Care Learning Centers*, *Inc.,* 299 NLRB 1171, 1172 (1990) Respondent's rule tends to inhibit employees from banding together by requiring that the employee discuss pay concerns with Respondent's management (Hobson), without the ability to get assistance from or discuss it with other employees, a third-party or outside entity. "Faced with such a requirement, some employees may never invoke the right to act in concert with other employees or to seek the assistance of a union, because they are unwilling to first run the risk of confronting the Respondent on an individual basis." *Kinder-Care,* supra at 1172.

I also find unpersuasive Respondent's implied argument that it should not be liable for violating the Act because the language at issue was subsequently removed. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), sets forth the standard for effectively repudiating unlawful conduct. The repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Passavant* supra at 138; *Douglas Division,* 228 NLRB 1016 (1977), and cases cited therein at 1024. The Board has also held that in order to effectively repudiate the unlawful conduct, the employer must adequately publicize the repudiation to the affected employees, refrain from engaging in the proscribed conduct post-publication, and assure employees that in the future the employer will not interfere with the exercise of their Section 7 rights. Id at 138–139.

While Wishon testified that Hobson posted a notice on the employee bulletin board that the ban restricting employees' discussion of their pay was not "right" and therefore rescinded, she noted that he later told her he was reinstating the ban because his attorney advised him that it was legal. Moreover, her testimony was vague regarding the timing of the posting, and the exact wording of the post. Hobson, however, only admitted to contacting Respondent's attorney for advice on the legality of the pay policy and the CA. I find that the record is devoid of evidence that there was an effective repudiation as to the pay policies or the CA. Respondent failed to place into evidence the notice that Wishon alleged Hobson posted on the bulletin board. Even assuming such a notice or poster existed, I am unable to determine if the repudiation was "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Passavant* supra at 138. In short, the additional factors necessary for establishing a successful repudiation remain unfulfilled.

Accordingly, I find Respondent's CA violates Section 8(a)(1) of the Act.

C. July 6 Respondent Mandate that Employees Sign Unlawful Company Policies and CA

The General Counsel argues that Respondent violated the Act because at a meeting on July 6, employees were required to sign the aforementioned unlawful company policies and the CA. Since Respondent required employees to sign and return the unlawful documents as a condition of continued employment, the General Counsel contends this constitutes an independent violation of the Act.

Respondent admits that the company policy regarding pay was distributed to employees on July 6, but denies the CA was

[22] The pages in Respondent's posthearing brief are not numbered. Therefore, I numbered Respondent's posthearing brief pages with the cover page number 1 and the signature and certificate of service page number 20.

given to employees on this date. Instead, Respondent insists the CA was distributed to the employee on May 28.

The evidence is undisputed that in order to retain their jobs, Respondent required employees to sign the company policies and the CA, which I previously found were unlawful. It is irrelevant whether the CA was given to the employees on May 28 or 5 weeks later on July 6 because the action remained unlawful. While Respondent may argue the employees' jobs were not contingent on them signing the documents, Hobson's tape-recorded admissions, addressed in the fact section of this decision, establish otherwise. (GC Exh. 12, 13.) Notably, Respondent does not address this issue in its posthearing brief, except to admit that portions of the company policies and the CA violate the Act and the documents were distributed to employees for their review and signatures. Consequently, I find that Respondent's action at the July 6, meeting and its admissions establish a violation of the Act.

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act when employees were informed that they were required to sign the company policies and the CA which contained unlawful provisions.

D. Mid-June 2015, Respondent Unlawfully Banned Employees from Discussing their Terms and Conditions of Employment

The General Counsel alleges that the Respondent unlawfully reprimanded McBride for complaining to other employees about being disciplined by Respondent and his opinion that Respondent unnecessarily hired an additional employee. The Respondent does not address this allegation in its posthearing brief.

The Board has consistently held that employee discussions and complaints about staffing levels are protected by Section 7 of the Act. See, e.g., *Bon Harbor Nursing & Rehabilitation Center*, 348 NLRB 1062, 1062 (2006); *Bethany Medical Center*, 328 NLRB 1094, 1094 (1999). Moreover, the Board has held that employees have a right under Section 7 to discuss "discipline or disciplinary investigations involving fellow employees." *Fresh & Easy Neighborhood Market, Inc.,* 358 NLRB 537 (2012); *Caesar's Palace*, 336 NLRB 271 (2001); *Verizon Wireless*, 349 NLRB 640, 658–659 (2007).

I find that Respondent, through Hobson, unlawfully precluded an employee from discussing his concerns about company operations and discipline with other employees. The facts establish that Hobson met with McBride to counsel him for purchasing "grease" without Hobson's authorization. It is also undisputed that after their discussion, McBride complained to other employees that Hobson unfairly criticized him for purchasing the grease. McBride also discussed with other employees his opinion that Hobson was unnecessarily hiring an additional contract employee. Hobson admitted on direct examination that when he learned of McBride's complaints he told him to stop "stirring up drama with employees" and interrupting business operations, and issued McBride a verbal reprimand. (Tr. 86–89.)

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act when Hobson verbally reprimanded McBride for discussing terms and conditions of employment, including discipline.

E. July 8, Respondent Unlawfully Interrogated Employees, Restricted Employees Ability to Engage in Protected Concerted Activity and Threatened Employees with Reprisal

The General Counsel charges that Respondent engaged in a series of acts to thwart its employees' efforts to assert their rights under Section 7 of the Act. In a meeting on July 8, with Lopez, Hobson told her several times that: she could not discuss her pay or workplace concerns with other employees; interrogated Lopez on whether she complained to federal agencies about work place rules; questioned her about her conversation with the Board's representatives; issued an implied threat that Lopez might suffer reprisal if she discussed those topics prohibited in the company policies and the CA; and implicitly threatened Lopez with reprisal for contacting the Board to complain about Respondent.

Respondent failed to address any of the aforementioned allegations in its posthearing brief, except to acknowledge that several times during their meeting, Hobson expressed to Lopez his dissatisfaction with her reporting Respondent to the "government." Respondent also appears to suggest that Lopez' complaints to Hobson are personal in nature, and therefore, do not rise to the level of protected concerted activity.

1. Unlawfully prohibited Lopez from discussing pay and other terms and conditions of employment

The General Counsel argues that Respondent, through Hobson, unlawfully sought to restrict Lopez' exercise of her Section 7 rights by explicitly telling her not to discuss her pay or other work related issues with other employees. Respondent does not address this allegation in its posthearing brief.

As noted previously in this decision, the Board has consistently held it is unlawful for employers to prohibit employees from disclosing and discussing wage and salary information. *Hyunadai*, supra. Likewise, employers cannot interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them in Section 7 of the Act. *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000).

The evidence is irrefutable that in the meeting with Lopez on July 8, Hobson explicitly told her that she could not discuss her pay or "business stuff" with other employees or outside parties. (GC Exh. 12; GC Exh. 13 Part 1, p. 6, 8, 9, 10; GC Exh. 13 Part 2, p. 7, 22.) Hobson also told Lopez to come to him about work related issues and not to discuss them with other employees. In the meeting Hobson later reversed himself, and told Lopez that she could discuss her pay with others or she could cross out the offending provisions of the pay policy. However, Hobson would almost immediately repudiate this sentiment by reiterating that she could not discuss her pay with other employees, and emphasize that all employees were required to sign the policy restricting their right to discuss pay with coworkers. The evidence clearly establishes that Hobson's repudiations fail to meet the standard established in *Passavant* at 138.

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act when on July 8, Respondent prohibited employees from discussing their wages and other terms and conditions of employment.

2. Unlawful interrogation on July 8

The General Counsel argues that Respondent, through Hobson, unlawfully interrogated Lopez about her contact with the Board and her discussions with other employees, thus chilling employees in the exercise of their Section 7 rights. Respondent does not address this allegation in its posthearing brief.

After instructing Lopez that she could not discuss her pay and other terms and conditions of employment with her coworkers, Hobson continued by pressing her to reveal whether she had spoken about her terms and conditions of employment with her coworkers. In response to Lopez complaint that Hobson does not want her to talk with coworkers about her concerns on the legality of the CA, Hobson said:

> Hobson: I'm not discouraging you from doing it. I want you to do it but I don't want you to be discussing it with other employees.
>
> Lopez: So, do you want me to go, "hey…"
>
> Hobson: Are you discussing it with other employees?
>
> Lopez: "Hey, he's violating the law"
>
> Hobson: Did you talk to me only about that or did you bring it up to other employees…

(GC Exhs. 12, 13.) After further discussion between them about the legality of the CA and part A and B, Hobson questioned Lopez about her contact with agents of the Board:

> Lopez: I'll tell you this. I have called the Labor Board and I have called the EEOC and I have great grounds.
>
> Hobson: mmhmm.
>
> Lopez: and I have plenty of stuff.
>
> Hobson: mmhmm
>
> Lopez: Do I want to do that to you? No. I've worked here for three years.
>
> Hobson: You called the Labor Board on us?
>
> Lopez: I love everyone I work for.
>
> Hobson: You called the Labor Board on us?
>
> Lopez: Yes I did.
>
> Hobson: Okay, what did you report on, on the Labor Board?
>
> Lopez: I just asked a question. Is this legal?

(GC Exhs. 12, 13.) The Board has adopted the test established in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964) to determine if management directly interrogating employees violates Section 8(a)(1) of the Act. *Field Family Associates, LP d/b/a Hampton Inn NY-JFK Airport,* 348 NLRB 16 (2006); *Smithfield Foods*, *Inc.,* 347 NLRB 1225 (2006). Under the *Bourne* test, the factors to consider are: the background; the nature of the information sought; the identity of the questioner; the place and method of interrogation; and the truthfulness of the reply. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). In applying these factors, I must assess whether, based on the facts of the specific case, the questioning at issue would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights. *Rossmore House*, 269 NLRB 1176, 1177 (1984); *Temecula Mechanical, Inc*., 358 NLRB 1225 (2012).

I find the evidence is irrefutable that in response to Lopez' declaration that she had discussed with other employees the legality of Respondent's parts A and B and the CA, and contacted the Board about those issues, Hobson pressed her for details about those interactions. The record establishes that on July 8, and after the mandatory employee meeting Hobson held on July 6, he met with Lopez in his conference room to discuss forecasting and issue Lopez her performance evaluation. After they finished reviewing the forecasting information, Lopez began to tell Hobson about her concerns with the validity of Respondent's parts A and B and the CA. The evidence shows that the primary purpose of the afternoon segment of their meeting became Hobson's attempt to determine who Lopez had contacted about the legality of the Respondent's parts A and B and the CA, the substance of those conversations, and why Lopez felt that she needed to discuss the issue with her coworkers and several federal agencies. Despite one curt statement from Hobson to Lopez that he did not mind if she talked with other employees when upset, he immediately followed it with the admonishment that she was not to discuss "business stuff" with them. This is no evidence that Hobson gave Lopez any other assurance that she could speak freely about her protected concerted activities without reprisal. Based on the evidence, I must conclude that Hobson questioned Lopez in an attempt to learn about the strength and depth of her and other employees' complaints to outside parties.

Accordingly, I find that the General Counsel has established that Respondent, through Hobson, unlawfully conducted an interrogation of its employees in violation of Sections 8(a)(1) of the Act.

3. Respondent did not threaten employees with unspecified reprisal for engaging in protected, concerted activities

According to the General Counsel, the revelation that Lopez had been discussing her concerns with other employees about the legality of the Respondent's parts A and B and the CA caused Hobson to threaten her with unspecified reprisals. The General Counsel argues that implied threat was revealed when Hobson stated,

> If it sounded like … I called you a witch it was in reference to something that, that is just referring to your actions. It wasn't referring to how you look or who you are or anything like that. I have to have, in this, this business her I have to have ultimate trust in you and confidentiality and as far as this stuff goes, hey, if there is a law against discussing that's fine. I'm not going to mention it anymore. But I'm also not going to be happy with people discussing their shit. I'm just not going to [be] happy about it and whether, you know it's against the law…

(GC Exh. 12; GC Exh. 13 part 2, p. 22.) Again, Respondent did not address this issue in its posthearing brief. However,

Hobson testified that he did not recall much of the conversation with Lopez on July 8, but acknowledged that he possibly accused her of "stirring the pot" with other employees and "going against" him.

The Board has established an objective test for determining if "the employer engaged in conduct which would reasonably have a tendency to interfere with the free exercise of employee rights under the Act." *Santa Barbara New-Press*, 357 NLRB 452, 476 (2011). This objective standard does not depend on whether the "employee in question was actually intimidated." *Multi-Ad Services, Inc.,* 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). Rather, whether the statements are a threat is viewed from the objective standpoint of the employee, over whom the employer has a measure of economic power. See *Mesker Door, Inc*., 357 NLRB 591, 595 (2011); *Inn at Fox Hollow*, 352 NLRB 1072, 1074 (2008); See also Section 8(c) of the Act (stating that the 'expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act …, if such expression contains no threat of reprisal or force or promise of benefit.'). The mere threat of an unspecified reprisal is sufficient to support a finding that the employer has violated Section 8 (a)(1) of the Act. *Metro One Loss Prevention Services Group*, 356 NLRB 89, 89 (2010).

I find that the General Counsel has failed to present persuasive evidence to establish that the above conversation contained an unlawful threat of an adverse consequence for Lopez' interactions with her coworkers about the Respondent's parts A and B and the CA.

Hobson's statement above is nothing more than an employer's expressing an opinion that although he will abide by the law, he will not do so happily. There is nothing in the statements to suggest that Lopez or any other employee will suffer adverse consequences because he has to follow the law. He did not utter to Lopez "if I have to abide by the law you (Lopez) will not be happy." That statement would have been more akin to an implied threat of reprisal. His statement, particularly if read within the context of the entire conversation, is simply an expression of his antipathy for a law. Nothing in the Act suggests that employers have to like the laws governing labor issues, only that they have to follow the laws. Moreover, Hobson's acknowledges this fact as part of the aforementioned statement.

Consequently, I recommend dismissal of paragraph 5(f) of the complaint.

4. Respondent did not threaten employees with unspecified reprisals for seekingaccess to the Board

The General Counsel also alleges that in the same July 8, meeting Respondent, through Hobson, threatened Lopez with unspecified reprisals for seeking access to the Board. Respondent does not address this allegation in its posthearing brief; and Hobson claimed, on direct-examination, to remember almost nothing from his discussion with Lopez on July 8. Nonetheless, General Counsel Exhibits 12 and 13 set forth those portions of the conversation Hobson contends that he cannot recall. It is evident from listening to and reading the recording of their conversation, Hobson was frustrated and annoyed with Lopez' decision to contact the Board. He made several statements revealing those emotions:

> You know what? You're really, you're really pushing me. You're sitting here telling me, little, looking for little tidbits telling me that you called the EEOC, the Department of Labor, all this. Why would you do that? Who does shit like that?
>
> * * *
>
> Yeah…you know, I don't appreciate you reporting things to me to the government. It's okay. If I have broken a law I will be made to pay for that through the Department of Labor.

(GC Exh. 12, 13.) Although Hobson expressed that "[i]t's okay" if Lopez reported him to the "Department of Labor," later in the conversation he told Lopez,

> And here you are, you're saying that you're working so hard for me but yet you're saying I called the Department of Labor, I called this and I called the Equal Opportunity Employment…
>
> * * *
>
> I have to have, in this, this business here I have to have ultimate trust in you and confidentiality and as far as this stuff goes, hey, if there is a law against discussing that's fine. I'm not going to mention it anymore. But I'm also not going to be happy with people discussing their shit. I'm just not going to [be] happy about it and whether, you know it's against the law…

(GC Exh. 13, part 2 p. 6, 22.) While these comments show Hobson's continuing annoyance with Lopez' actions despite his protestations to the contrary, I do not find that they are evidence of expressed or implied threats of reprisal.

The General Counsel argues that, taken in context, Hobson's statements to Lopez would "reasonably tend to restrain, coerce or interfere with rights guaranteed by the Act." *Bloomfield Health Care Center*, 352 NLRB 252 (2008), quoting *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). While the Respondent admits in its posthearing brief that Hobson told Lopez on several occasions that he did not "appreciate" Lopez reporting him "to the government," it failed to put forth a counter-argument addressing the statements. Nonetheless, I find that the statements do not rise to the level of a threat of an unspecified (or specified) reprisal.

Although Hobson's statements could have reasonably led Lopez to believe that he was unhappy, or even angry, with her decision to discuss her concerns with the Board, the statements do not establish a threat in violation of Section 8(a)(1) of the Act. The statements cannot be read without placing them in context with the overall discussion that Hobson and Lopez engaged in on July 8. The statements, as set forth above, establish that in a meeting between Hobson and Lopez, he expressed to Lopez that he was unhappy with her decision to contact the Board, EEOC, and DOL. Interspersed within Hobson's statements expressing displeasure that Lopez contacted the Board

about Respondent's company policies and the CA, Hobson also praises her work performance, encourages her to assume greater responsibility in sales, informs her that she is receiving a bonus, details his efforts to defend her against other individuals, and acknowledging her right to file a charge with the Board. I find nothing in Hobson's statements to suggest that he implicitly threatened Lopez with an unspecified adverse employment action because she contacted the Board.

Accordingly, I find that the General Counsel failed to meet its burden of proof regarding this allegation and recommend that paragraph 5(b) of the complaint be dismissed.

F. On July 9, Employees Banned from Discussing Terms and Conditions of Employment and Required to Sign Unlawful Company Policies and CA

The General Counsel alleges that Hobson's action in a meeting with employees on July 9 violated the Act because, despite their unlawful provisions, he told employees they would have to sign and return to Respondent the company policies and the CA. In its posthearing brief, Respondent did not address this allegation, except to note that Hobson met with the Respondent's attorney on July 9 to discuss the issues raised by Lopez "regarding the company policy on discussing pay and the confidentiality agreement." (R. Br. 11.)

The evidence is undisputed that after his meeting with Lopez on July 9, Hobson called Wishon into his office to ask her opinion on the legality of the company policy prohibiting employees from discussing their wages with each other. After she expressed doubt about its validity, Hobson retrieved the policy from the computer and told her that he was eliminating the offending pay provision. He directed her to get the revised document from the printer, place the reprinted copies on his desk, and told her he wanted the employees to sign them. Hobson also told her that he was meeting with his attorney later that day to ask for a legal opinion regarding the legality of the documents. When he returned from meeting with his attorney, Hobson informed employees that he was reinserting the pay ban into the policy because his attorney advised him that it was illegal only if applied to federal employees. Hobson then instructed them that all employees were required to review, sign and return the company policies that included the ban on discussing their pay with each other and the CA. The company policies also stated that employees could be terminated for violating the ban on disclosing and discussing wage and salary information; and the CA threatened employees with large fines for violating its provisions.

As previously noted, the Board has consistently held that nondisclosure rules and policies that ban the disclosure and discussion of wage and salary information are invalid. *Hyundai*, supra at 18; *Bryant Health Center, Inc.*, 353 NLRB 739. I also found and Respondent admitted that its company policies and the CA violated the Act. Therefore, it is clear that Hobson committed an independent violation of the Act when he told employees on July 9, that they would be required to accept and sign the unlawful company policies and the CA.

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act when on July 9, Respondent, through Hobson, prohibited employees from discussing their wages and other terms and conditions of employment; and required them to sign unlawful company policies and CA.

G. Four Separate 8(a)(1) Violations Committed on July 13, 2015

The General Counsel alleges that on July 13, Respondent, through Hobson, violated the Act on four separate occasions when: employees were prohibited from discussing their wages and other terms and conditions of employment; employees were told that Respondent terminated an employee for raising concerns about its company policies and CA; employees were threatened with termination for discussing their wages and other terms and conditions of employment; and employees were prohibited from discussing the termination of an employee.

1. Unlawful ban on employees discussing their wages and other employment matters and threat of termination for violating the ban

The evidence establishes that shortly after Hobson fired Lopez, he called McBride and Tanner into his office to explain his reasons for terminating her. During this discussion, Hobson reiterated that Lopez was incorrect in the information she provided that cast doubt on the legality of Respondent's company policy. He went on to note that the Respondent's attorney advised him the prohibition barring employees from discussing their pay with each other is illegal only when applied to federal employees; Respondent's employees would be required to sign the documents; and employees could be terminated if they discussed their "bonuses and raises." Again, these statements are clear violations of the Act. See *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1131 (finding unlawful employer's rule prohibiting employees from disclosing "personal information and documents" to nonemployees with the threat of "termination" or "legal action" for violating the rule); *Taylor Made Transportation Services, Inc*., 358 NLRB 427, 434–435 (2012) (finding unlawful employer's issuance of a memorandum reminding employees of its unlawful policy prohibiting discussions about wages with threat of discipline up to and including termination).

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act when on July 13, Respondent, through Hobson, prohibited employees from discussing their wages and other terms and conditions of employment; and threatened with termination for discussing their wages and other terms and conditions of employment.

2. Hobson did not tell employees Lopez was terminated because of concerns she raised about the Respondent's company policies and CA

The General Counsel contends Hobson told McBride (and Tanner) that one of the reasons for Lopez' termination was because she complained about the CA and the pay provision in the company policies. However, the record shows McBride testified that Hobson said he had to fire Lopez because of her insubordination and disrespectful attitude towards him. He then engaged in the following exchange with counsel for the General Counsel:

LeMaster: What was discussed in this meeting?

McBride: He brought us up there and he said, "I had to let her go. She was being disrespectful."

LeMaster: Ok. Did he say anything else?

McBride: I asked why?

LeMaster: Did he answer you?

McBride: Yeah, he had an answer. He said it was over the e-mails sent to the MOS customer about some data and some cost problems they had.

LeMaster: Okay. Did [Hobson] give any examples of [Lopez] being disrespectful?

McBride: Yes

LeMaster: What were those?

McBride: He said one of the examples she was – besides the e-mail problem, and that she was always crossing her arms, and he said that is disrespectful to him.

LeMaster: Did he give you any other examples?

McBride: Yes. He had – oh, my mind just went blank.

LeMaster: Take your time. Do you recall, was it anything that she said, that she did?

McBride: Yeah, whenever things was brought up why he let her go, it was the data that she brought in just showed the legality, that we couldn't talk about our bonuses and raises, that was supposed to be legal, and she showed that where she got the information from, who she talked, to and where she got the information from.

(Tr. 195–196.) The above is the only part of McBride's testimony that addresses Lopez' protected activity and termination together. However, the entire exchange was so oddly worded that I cannot draw conclusions about whether McBride was responding to the original question from the counsel for the General Counsel about why Hobson said he fired Lopez. In fact, it appears that the counsel for the General Counsel might have been asking McBride what Lopez told him was the reason for her firing; and she responded that it was because of her questions and research into the legality of the company policies and CA. However, I cannot discern from the wording of the question its exact meaning. Moreover, McBride's response was close to gibberish. It consisted of a series of incomplete sentences strung together as one completely incomprehensible sentence. The counsel for the General Counsel did not ask additional questions to clarify McBride's testimony on this point so I am left with confusion rather than clarity.

Accordingly, I find that the General Counsel failed to establish that Respondent, through Hobson, told McBride and Tanner that Lopez was terminated because she raised concerns about the company policies and CA in violation of Section 8(a)(1) of the Act.

3. On July 13, Respondent prohibited employees from discussing Lopez' termination

The General Counsel argues that Respondent, through Hobson, unlawfully told employees that they could not disclose or discuss with anyone the termination of Lopez. Respondent does not address this allegation in its posthearing brief.

It is undisputed that Hobson told McBride not to disclose or discuss, with anyone, the conversation that he had with him and Tanner earlier in the day about his reasons for terminating Lopez. Hobson's action was a clear restriction of McBride's Section 7 right in violation of the Act. See *Kinder-Care Learning Centers*, supra. (employer rule prohibiting employees from discussing their terms and conditions of employment with parents of children enrolled in the school violates the Act); *Verizon Wireless*, 349 NLRB 640 (2007) (banning employees from discussing workplace concerns about discipline violates the Act).

Accordingly, I find that the General Counsel has established that Respondent, through Hobson, told McBride that he could not discuss the termination of Lopez with anyone in violation of Section 8(a)(1) of the Act.

H. Unlawful Termination of Lopez

The General Counsel alleges that Respondent violated Section 8(a)(1) and (4) of the Act by terminating Lopez for engaging in protected concerted activity. Respondent counters that Lopez was a supervisor and therefore not entitled to protection under the Act. Even assuming, however, that Lopez was not a supervisor, Respondent insists that she was terminated because of her history of insubordination; and issues related to her job performance.

As with 8(a)(3) discrimination cases, the Board applies the *Wright Line*[23] analysis to 8(a) (1) concerted activity cases that involve an employer's motivation for taking an adverse employment action against employees. *Hoodview Vending Co.,* 359 NLRB 355 (2012), reaffirmed 362 NLRB No. 81 (2015); *Saigon Gourmet Restaurant, Inc*., 353 NLRB 1063, 1065 (2009). The burden is on the General Counsel to initially establish that a substantial or motivating factor in the employer's decision to take adverse employment action against an employee was the employee's union or other protected activity. In order to establish this initial showing of discrimination, the evidence must prove: (1) the employee engaged in protected concerted activities; (2) the employer knew of the concerted nature of the activities; and (3) the adverse action taken against the employee was motivated by the activity. Once the General Counsel has met its initial showing that the protected conduct was a motivating or substantial reason in employer's decision to take the adverse action, the employer has the burden of production by presenting evidence the action would have occurred even absent the protected concerted activity. The General Counsel may offer proof that the employer's articulated reason is false or pretextual. *Hoodview Vending Co.,* supra.

The General Counsel retains the ultimate burden of proving discrimination. *Wright Line,* id. However, where "the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the pro-

[23] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

tected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)). The *Wright Line* analysis is not applicable when there is no dispute that the employer took action against the employee because the employee engaged in protected concerted activity. *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed. Appx. 524 (D.C. Cir. 2003).

A *Wright Line* analysis is appropriate in this case because Respondent's motive is at issue. In order to sustain its initial burden of proof, the General Counsel must first prove that Lopez engaged in concerted protected activity and it was the substantial or motivating factor in Respondent's decision to discharge her. Upon such a showing, Respondent then must present evidence that it would have terminated Lopez even absent the protected concerted activity. See *Correctional Medical Services*, 356 NLRB 277, 278 (2010).

1. Lopez' protected concerted activity

Clearly, Lopez' termination is an adverse employment action. Therefore, the next question is whether she engaged in protected concerted activity. The Respondent insists that Lopez' complaints to Respondent about issues at the company were "rife with personal complaints." Despite Respondent's argument to the contrary, I find that the evidence clearly establishes that Lopez engaged in protected concerted activity. (R. Br. 17)

The evidence is undisputed that after the employee meeting on July 6, Lopez expressed her concerns to coworkers about the requirement that they had to sign Respondent's company policies and CA or risk termination. They agreed that Lopez would research the legality of the company policies and CA, and discuss those concerns and findings with Hobson. When Lopez met with Hobson on July 8, she raised issues of a personal nature, but a larger portion of their conversation involved Lopez' objections to and questions about the company policies and CA; and her contacting the Board and other federal agencies to complain about those documents. Lopez' actions are the epitome of protected concerted activity. The personal nature of some of Lopez' complaints does not negate the fact that her objections about the ban on discussing pay with other employees and specific provisions in the CA are protected concerted activity because the acts were taken for the mutual aid or protection of all the employees (getting the provisions in the company policies and CA rescinded for all employees). See, *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 3 (2014) (explaining the "mutual aid or protection" analysis focuses on whether there is a connection between the activity "and matters concerning the workplace or employees' interests as employees."); *Caesar's Palace*, 336 NLRB 271 (2001); *Verizon Wireless*, 349 NLRB 640, 658–659 (2007).

Lopez engaged in protected concerted activity when she voiced to Hobson, the Board and, or her coworkers concerns about the unfairness of the Respondent's company policies and CA; the disparate manner in which the Respondent issued bonuses; and the change to the dress code and bereavement policies. While her complaints about the vacation accrual, dress code, and bereavement policies may have contained an element of selfish motivation, it is undisputed that she discussed those subjects with her coworkers and any changes to the dress code and bereavement policies would have affected the entire work force. See *Fresh & Easy Neighborhood Market, Inc.,* 358 NLRB 537 (2012); *Caesar's Palace*, supra.; *Verizon Wireless*, supra. Moreover, Lopez' discussion with her coworkers about the CA and the company's policy restrictions on employees' discussion of their wages is considered "inherently concerted" activity. See *Automatic Screw Products Co*., *Inc.,* 306 NLRB 1072, 1072 (1992) (employee discussions of wages are inherently concerted);

Accordingly, I find that Lopez engaged in protected concerted activity.

2. Respondent's knowledge of Lopez' protected concerted activity

I have already determined that Lopez engaged in protected concerted activity in the meeting with Hobson on July 8. The evidence is uncontroverted that Lopez engaged in a discussion with Hobson for about 1-½ hours on July 8, questioning and objecting to the Respondent's company policies prohibiting employees from talking about their pay with other people and the discipline and, or fines levied for violating their provisions and those of the CA. There was also discussion about Lopez' contact with the Board; and Hobson's questions to her regarding that contact. It is impossible for Hobson to deny being aware of Lopez' actions since he was obviously a participant in the conversation. Moreover, the evidence supports a finding that Respondent, through Hobson, was aware that Lopez' actions were protected concerted activity. In his meeting with Lopez, Hobson interrogated her about whether she had discussed with other employees her concerns with Respondent's part A and B and the CA. His interrogation of her supports a finding that Hobson recognized the protected concerted nature of Lopez' activities. Further, his questioning of Wishon the following day about her opinion on the legality of the documents; and a subsequent announcement to several employees that Lopez' information about the company policies and CA were incorrect and all employees were required to sign them, also bolster my finding that Respondent, through Hobson, was aware that Lopez was engaged in protected concerted activity.

Consequently, I find that Respondent had knowledge of Lopez' protected concerted activity prior to her termination.

3. Adverse employment action based on discriminatory animus

The remaining step is for the General Counsel to establish whether the Respondent terminated Lopez because of discriminatory animus. If the General Counsel establishes an initial showing of discrimination, the burden shifts to the Respondent to show, as an affirmative defense, that it would have terminated Lopez even in the absence of her concerted protected activities.

In its brief, the General Counsel contends that the evidence is replete with examples of Hobson's personal animus towards Lopez as a result of her protected conduct. Moreover, the General Counsel argues that Hobson committed independent violations of the Act that constitute evidence of animus when he unlawfully: "(1) interrogated Lopez about her protected conver-

sations with her co-workers and Board agents and threatened Lopez with unspecified reprisals for doing so; (2) prohibited Lopez from discussing her terms and conditions of employment with others; (3) interrogated Lopez about her protected communications with Board agents; and (4) threatened Lopez with unspecified reprisal as a result of her contacting the Board." (R Br. 53.) The General Counsel also contends that the timing of Lopez' termination (5 days after her meeting with Hobson to complain about the company policies and CA and inform him of her contact with the Board) is evidence of Hobson's discriminatory animus towards her. Finally, the General Counsel insist that several other factors support a finding of discriminatory animus: (1) Hobson informing McBride that Lopez protected activity was a reason for her termination; and (2) Hobson's insistence on disciplining Lopez for being a "no call/no show" despite Wishon assuring him that Lopez had provided the appropriate notification.

Respondent counters that Lopez was terminated because she was insubordinate and disrespectful towards the owner and president of the company; and experienced a decline in her job performance, exhibited by the RBC incident. The Respondent also insists that the decision to terminate Lopez was made before she engaged in the protected concerted activity; and there is no evidence of discriminatory animus by Hobson towards Lopez.

Discriminatory animus can be inferred from both circumstantial and direct evidence. The Board considers several factors in determining whether an inference of discriminatory animus can be sustained. The factors to consider are proffering false reasons in defense of taking the adverse action, disparate treatment of certain employees with similar work records or offenses, deviation from past practice, and the proximity in time of the discipline to the protected activity. *Embassy Vacation Resorts*, 340 NLRB 846, 847 (2003); *Austal USA, LLC*, 356 NLRB 363, 363 (2010); *Lucky Club Co*, 360 NLRB 271 (2014).

I find that the Respondent's actions evinced discriminatory animus when: Hobson unlawfully interrogated Lopez about her protected concerted activity; unlawfully prohibited her from discussing terms and conditions of employment with other employees; and unlawfully interrogated her about her protected contact with the Board.[24] Hobson's and Lopez' conversation on July 8, contained several instances of Hobson assuring Lopez that she had the right to file a claim with the Board; and he would remove the offending provisions from the company policies and CA. However, he would almost immediately disavow those statements and accuse Lopez of acting against his best interest. Likewise, the illegal provisions remained in the company policies and CA, which he later reissued to employees to sign and return to him. The offending provisions were not removed until after Lopez' termination. See, e.g., *Sunrise Health Care Corp.*, 334 NLRB 903, 2001 (independent 8(a)(1) violations constitute evidence of animus);

Further, the record supports a finding that Hobson was pleased with Lopez' job performance until she began to complain about the company's policies and the CA. Although Hobson testified that he had been displeased with Lopez' job performance since early to middle 2014, there is no evidence that over the next year he documented this alleged decline. On the contrary, the evidence contains one performance appraisal for Lopez; and it lists as the only area for improvement a caution for her not to discuss personal complaints "in front of other Employees." (GC Exh. 14.) There is nothing else in the record that shows written documentation of a decline in the quality of Lopez' work performance during her tenure with Respondent. Moreover, in their meeting on July 8, Hobson characterized Lopez as a "stellar employee." (GC Exh. 13, Part 2 p. 9.) In the same meeting he repeatedly reminded her that: she was his highest paid employee; he supported her in the face of opposition from other people, including his wife; he did not believe her actions regarding the MOS and RBC incidents were intentional; and she was doing a good job. Despite Hobson's failure to document Lopez' alleged decline in job performance, and contradictory statements that she was a "stellar" employee; a mere 5 days after her discussion with Hobson about the illegality of Respondent's company policies and CA; the revisions to the dress code and bereavement policies; and notice of her contact with the Board's representatives, Respondent terminated Lopez.

Based on the evidence of record, I find that Respondent's actions establishes discriminatory animus towards Lopez because she engaged in protected concerted activity. Consequently, I find that the General Counsel has met its initial burden of proof.

Since the General Counsel has met his initial burden, the Respondent must show that Lopez would have been terminated even absent her protected concerted activity. While acknowledging that Hobson expressed displeasure with Lopez for talking with coworkers and the Board about Respondent's company policies and CA, Respondent notes that he told her she had a right to file a claim; and Respondent also contends that the decision to fire Lopez had been made "days before she contacted the NLRB." (R. Br. 16.) Further, Respondent insists that Lopez was terminated because she was insubordinate and disrespectful to Hobson.

I find that the Respondent has failed to establish its burden of production; and that the proffered reasons for terminating Lopez are pretextual.

Listening to the recording of the meeting on the July 8, between Hobson and Lopez, it was obviously contentious at times. Both of them were guilty of poor behavior. While it appears that at certain points Lopez goaded Hobson into making incriminating statements, the evidence is clear that he voluntarily took the bait. During the meeting, she frequently interrupted him and was often argumentative. Moreover, Lopez made clear to Hobson that she disliked his wife and was angry with him for seemingly taking his wife's side against her in their disputes. Lopez also told Hobson that she was frustrated with the attendance and work habits of his daughter, Halle. She complained several times that she was bored with her job because Hobson had not provided her with enough meaningful duties. The conversation was peppered with profanity, accusa-

[24] As noted earlier in the decision, I did not find that Hobson unlawfully threatened Lopez with unspecified reprisal for contacting the Board or coworkers.

tions, and, or sarcasm by both of them. Nevertheless, Lopez' behavior does not negate the evidence which supports a finding that but for her protected concerted activities she would not have been terminated. Although it is evident to me from the tenor of the conversation that Lopez was not intimidated by Hobson in the meeting, it is also obvious to me that Hobson was frustrated and angry by her actions involving the company policies, CA, and contact with the Board and other employees about the unlawfulness of those documents.

The Respondent argues that the evidence is devoid of animus; and Hobson's actions towards Lopez were supportive, rather than hostile. It is undisputed that in a meeting with Lopez on July 8, Hobson acknowledged to Lopez her right to file a claim. He made several comments that he was not "bothered" by her contact with the Board because he had not purposely tried to break the law. Moreover, Hobson told Lopez that he was confident in her advice about the documents' unlawfulness; and repeatedly told her that he would delete the offending language from the company policies and CA. During their meeting, he also made numerous statements supportive of Lopez. Significantly, Hobson told Lopez that he had always been supportive of her; and would not have retained her if he felt that she were "bad business." (GC Exh. Part 3 p. 7.) He noted that she was a stellar employee, highly intelligent, and had a wonderful attitude with him. Towards the end of their meeting, Hobson encouraged Lopez to take on responsibility for sales because it is the "highest paid position in any company." Id. He explained to her that she would train Tanner on bearings; and could learn from him because Tanner has a vast knowledge of sales and the bearing's market.

I do not find Respondent's argument persuasive for a several reasons: (1) Respondent's shifting rationale for terminating Lopez; (2) Hobson's repeated disavowals of his statements supporting Lopez exercising her Section 7 rights and his overall lack of credibility; and (3) the suspicious timing of Lopez' termination.

During the hearing and in its posthearing brief, Respondent argued Lopez was terminated because she was insubordinate, erroneously sent company information to its customer (RBC), failed to follow instructions regarding MOS, suffered a decline in her job performance, and was a "no call/no show" on July 10. I find, however, that Respondent's argument is not supported by the evidence. In response to questioning by the counsel for the General Counsel, Hobson testified that examples of Lopez' insubordination were: her occasionally crossing her arms when talking with him, snatching papers from his hands, rolling her eyes and turning her back to him, and walking away from him while he was talking to her. As previously found, however, the record is devoid of evidence that Respondent disciplined Lopez for or documented those or any other instances of her alleged insubordination. Likewise, there is no evidence that Hobson mentioned to Lopez that he felt some of her actions towards him were disrespectful and insubordinate until their meeting on July 8, when she began to complain about the company policies and the CA.

Equally as weak as the charge of insubordination, is Respondent's argument that an alleged decline in Lopez' job performance was a factor in the decision to terminate her. Again, there is no evidence documenting a decline in her performance. Moreover, in his meeting with her on July 8, Hobson reminded Lopez that he had "not once written her up." (GC Exh. 13, Part 3, p. 3.) The lone performance appraisal of record makes mention of only one area that needed improvement, the admonishment that Lopez "not bring up personal complaints or problems in front of other Employees." (Tr. 159–160; GC Exh. 14.)

Hobson also testified that Lopez was terminated because she sent "damning" confidential company information to one of Respondent's China suppliers. I do not find his testimony credible on this point. During his meeting with Lopez on July 8, he clearly told her that he believed she sent MOS the information without malicious intent. Significantly, their discussion about this incident was rather detailed with Hobson spending several minutes assuring her that he believed her motives were innocent. Therefore, it strains credulity to believe that Lopez' action was a legitimate factor in Respondent's decision to terminate her. Similarly, Hobson testified that the catalyst for his decision to fire her was Lopez informing a RBC representative that she was told by Hobson not to send them weekly status reports. (Tr. 260.) I do not credit his testimony on this point because Respondent never counseled or otherwise disciplined Lopez for this incident, making it unlikely that it was a credible factor in Respondent's decision to terminate her.

Hobson testified that Lopez' "no call/no show" was the final act, in a series of acts, that resulted in her termination. However, Respondent's posthearing brief contradicts his testimony noting that Hobson made the decision to terminate Lopez after the RBC incident. (R. Br. 16.) Regardless, I do not find either contention is credible. McBride credibly testified to the reasons Hobson gave him for firing Lopez and none included her "no call/no show." Another strike against Hobson's credibility on this point is his response to Lopez' complaint about the revision to the Respondent's sick leave policy. Hobson told her because she was a salaried employee she did not have to be concerned with sick pay, implying that she did not have to worry about taking a reasonable amount of sick leave. The Respondent attempted to show that Lopez was required to personally notify Hobson if she was going to be absent, and her failure to do so resulted in her termination. However, I previously found Wishon's testimony credible that about a year prior to Lopez' termination, Hobson had informed employees that Wishon should be notified if they would be late to or absent from work. Except for his self-serving testimony, there is no substantive or credible evidence to establish that Lopez was exempted from this procedure and instead had to personally notify Hobson. Last, Hobson acknowledged that, during her tenure with Respondent, Lopez had to sign the company policies, including the document addressing attendance. (Tr. 67–68; GC Exh. 3, 4.) The document that Lopez and other employees signed does not specify a particular person to notify if they are absent or late to work. Hobson admitted that in a "normal situation" the company policies addressing the procedure for reporting "tardies" or absences and the discipline employees are subject to for infractions also applied to Lopez an "in a normal situation." However, he provides no credible reason why the situation at issue was not "normal" other than to testify that "I

was upset." The fact remains that Lopez provided advanced notice of her absence.

In response to the General Counsel's argument that the timing of Lopez' termination is evidence of discriminatory animus, Respondent contends that the decision to fire Lopez had been made "days before she contacted the NLRB." I do not find Respondent's arguments credible for several reasons. Hobson argued that in April he started contemplating firing Lopez but because of the RBC incident, he made the decision to terminate Lopez after Tanner started working for Respondent and had been fully trained. In his sworn affidavit for the OSHA complaint, Hobson attested "I [then] began discussions with Evan Tanner in early June of 2015 to hire him, to absorb most of Ms. Lopez' responsibilities, with the intent of firing her or demoting her with a reduction in pay. Those discussions led to his hiring on June 24 with a start-date of July 10th" (Tr. 80). His statement reveals Hobson was still uncertain about Lopez' status in the company. Tanner reaffirmed the uncertainty of Respondent's decision to either fire or demote Lopez stating that the "discussions at that time, were more of uncertainty about Tera and what would take place now that I was coming into HBI. I can't recall fully if Gene discussed whether he had talked to Tera about me coming in, or what her role would be subsequently." (Tr. 105.) It has been established that Hobson initially contacted Tanner in April about working for Respondent. Tanner testified that about 2 weeks after that contact he spoke with Hobson on the telephone who told him that Hobson's plan was to hire Tanner; and Lopez would train him to take over her position. Hobson also told him that Hobson was uncertain of his plans for Lopez but noted he might move her to a lesser position. Even Hobson's text message to Norman revealed he had not decided whether to demote or fire Lopez. (GC Exh. 7.)

Again, it must be noted that Hobson told Lopez on July 8, that he would not have kept her as an employee if he felt she had malicious intent regarding her actions in the MOS and RBC incidents. He also complimented her on being highly intelligent, a stellar employee, and performing well in her position. It was not until after their July 8, conversation that Hobson contacted Respondent's attorney for advice of terminating Lopez. I find that the timing of Lopez' termination also supports a finding of discriminatory animus.

Accordingly, I find that Respondent's action to terminate Lopez violates Section the Act.

I. Supervisory of Tera Lopez

Respondent argues that Lopez is a supervisor, and therefore not entitled to protection under the Act. The General Counsel disagrees with this designation, asserting Lopez was merely a worker. However, assuming that Lopez is found not to be an employee under the Act, the General Counsel contends that her termination remains a violation of the Act because "unimpeded access to the Board's processes is essential and available to supervisors and managers. In support of his position, the General Counsel cites *Hi-Craft Clothing Co.*, 251 NLRB 1310 (1980). See also *General Services, Inc.*, 229 NLRB 940 (1977); *SNE Enterprises*, 347 NLRB 472, 497 (2006) citing *Hi-Craft Clothing Co*., 251 NLRB 1310 (1980).

The burden of establishing supervisory status is with the party alleging that status. The party asserting supervisory status must set forth specific facts which prove the existence of supervisory authority. *Commercial Movers, Inc*., 240 NLRB 288, 290 (1979); Under Section 2(11) of the Act, the status of supervisor is determined by the duties performed and not the title or job classification. Section 2(11) defines a supervisor as any person

> having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if … such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Based on the statutory language, an individual is a supervisor if: the individual has authority to take one of the actions listed in Section 2(11) or to effectively recommend such action; the individual exercises this authority in the interest of the employer; and the exercise of this authority is not merely routine or clerical in nature, but instead requires the individual to use independent judgment. *NLRB v. Kentucky River Community Care, Inc*., 121 S. Ct. 1861, 1864 (2001); *NLRB v. Health Care & Retirement Corp*., 511 U.S. 571, 573–574 (1994). Moreover, the Board has consistently held that the evidence must show that a presumed supervisor is accountable for a subordinate's work performance. *In re Oakwood Healthcare, Inc*., 348 NLRB 686, 691–692 (2006).

Respondent argues that Lopez was a supervisor because she had authority to: hire and fire employees, perform employee evaluations, access QuickBooks, approve employees' sick leave requests, and organize work parties. Further, according to Respondent, Lopez assumed control of the work force when Hobson was away from the facility. Respondent admits that Hobson removed some of those duties from Lopez, but insists it was done because she was insubordinate, and had committed mistakes involving MOS and RBC. Lopez counters that in late-December 2014, Hobson removed from her control: authority to hire and fire employees, perform employee evaluations, access QuickBooks, approve employees' sick leave requests, and organize work parties.

I find the evidence does not establish that Lopez meets the statutory definition of a supervisor. Hobson admitted that he retained sole authority to hire permanent employees. Occasionally, Lopez was allowed to work parties and hire temporary employees or reassign permanent employees to assist with special projects. Moreover, Hobson's testimony that he could not recall the last employee Lopez hired is not credible. Respondent employed fewer than 10 employees, so I find it highly unlikely that he is unable to recall the last employee Lopez allegedly hired. Hobson's failure to truthfully testify on this point cause me to discount his testimony about Lopez' hiring authority.

Lopez, according to Respondent, had authority to independently evaluate, discipline, and discharge employees. Hobson testified that Lopez terminated several employees: Maturino, Halverson, Tracy, Shawn, and Eastman. He provided limited information about the circumstances surrounding their

departures, except for estimates on their lengths of employment with Respondent. Hobson did, however, admit that Lopez sought his approval to terminate Eastman. In contrast, Lopez testified that Hobson instructed her to fire Maturino and Halverson; and Hobson, without her input, made the decision to terminate Tracy and Eastman. She noted that Shawn voluntarily quit for a position with another employer. I am finding that Lopez' testimony about her ability to terminate and evaluate employees more credible than Hobson's contradictory statements on this point. Unlike Respondent, the General Counsel produced objective evidence establishing that Lopez' only role in the performance appraisals was to write whatever Hobson told her to include in an employee's evaluation. (GC Exh. 20.) There was also objective evidence that Hobson made decisions on disciplinary actions and work assignments. (GC Exh. 21.) Moreover, Hobson contradicted his own testimony that Lopez had authority to independently fire employees. An example of Hobson's contradictory statements is his retelling of Lopez' attempt to get him to terminate an unnamed warehouse worker with a heart condition. According to Hobson, Lopez told him that he should terminate the worker because he was a "liability" due to his heart condition. A few days later, McBride also tried to persuade him to fire the worker; and Hobson felt it was part of a coordinated plan by Lopez and McBride to get the worker fired. This reveals possibly a coordinated effort by two employees to get their boss to fire a coworker; but it clearly does not establish that Lopez had independent authority to fire employees. The entire incident points to the contrary conclusion.

As previously noted, one of Lopez' job responsibilities was to conduct forecasting. Hobson attempted to show that it was a supervisory function that Lopez performed independently because he rarely reviewed her forecasting reports. This argument fails for two reasons. There is objective evidence that Hobson reviewed and had final approval of her forecasting reports. (GC Exhs. 24, 28.) More importantly, Respondent failed to provide a legal argument or case cites for the proposition that "forecasting" is a uniquely supervisory function.

Finally, Respondent attempted to show, through the testimonies of Greenwood and Halle, that Lopez exercised supervisory authority over them. Greenwood testified that Lopez gave him general help in the warehouse, and assisted with "my days off for my sick days, and just overseeing the pulling and shipping of the orders." (Tr. 300–301.) Likewise, Halle testified that Lopez reviewed her duty drawback[25] paperwork before it was processed, and "if I needed to leave early, I would ask her." (Tr. 297) The General Counsel aptly notes in its posthearing brief that the Board has consistently held that inferences, suppositions or conclusory statements without detailed, specific evidence fails to prove supervisory authority. *Sears, Roebuck & Co*., 304 NLRB 193 (1991); *Securitas Critical Infrastructure Services, Inc. v. NLRB*, 817 F.3d 1074 (2016).

Accordingly, I find that the evidence does not establish that Lopez meets the definition of a supervisor as set forth in Section 2(11) of the Act. I do find, however, that Respondent violated the Act when Respondent terminated Lopez because she engaged in protected concerted activity.

[25] Halle defined duty drawback as processing a claim to receive reimbursement for the duty paid on an imported product.

CONCLUSIONS OF LAW

1. Respondent, Hobson Bearing International, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By, on or about July 13, terminating Tera Lopez because she engaged in protected concerted activities, Respondent has violated Section 8(a)(1) and (4) of the Act.

3. By, on or about January 16, maintaining, and since about July 6, reissuing and maintaining an unlawful rule prohibiting employees from discussing their pay and, or bonuses, Respondent has violated Section 8(a)(1) of the Act.

4. By, on or about January 16, physically distributing to employees, promulgating and since then maintaining a rule titled Agreement of Restriction/Confidentiality, restricting employees from discussing or sharing confidential information, defined as including but not limited to, individuals' proprietary information; vital company information; and our information, Respondent has violated Section 8(a)(1) of the Act.

5. By, on or about mid-June, Respondent, through Gene Hobson, prohibiting employees from discussing their terms and conditions of employment, including disciplinary issues, Respondent has violated Section 8(a)(1) of the Act.

6. By, on or about July 6, telling employees that they were required to sign agreements to abide by unlawful policies prohibiting employees from discussing their wages and threatening employees with termination if they violated them; and an overbroad confidentiality agreement prohibiting employees from discussing their terms and conditions of employment, Respondent has violated Section 8(a)(1) of the Act.

7. By, on or about July 8, prohibiting employees from discussing their wages and other terms and conditions of employment, Respondent has violated Section 8(a)(1) of the Act.

8. By, on or about July 8, interrogating employees about their protected concerted activities by asking employees if they had complained about the company policies and the confidentiality agreement, Respondent has violated Section 8(a)(1) of the Act.

9. By, on or about July 8, interrogating employees about their protected concerted activities, by asking employees about conversations they had with agents of the Board regarding Respondent's company policies and confidentiality agreement, Respondent has violated Section 8(a)(1) of the Act.

10. By, on or about July 9, prohibiting employees from discussing their wages and other terms and conditions of employment, Respondent has violated Section 8(a)(1) of the Act.

11. By, on or about July 9, telling employees that they were required to sign agreements to abide by the company policies and confidentiality agreement, Respondent has violated Section 8(a)(1) of the Act.

12. By, on or about July 13, prohibiting employees from discussing their wages and other terms and conditions of employment, Respondent has violated Section 8(a)(1) of the Act.

13. By, on or about July 13, threatening to terminate employees for discussing their wages and other terms and condi-

tions of employment, Respondent has violated Section 8(a)(1) of the Act.

14. By, on or about July 13, prohibiting employees from discussing the termination of an employee, Respondent has violated Section 8(a)(1) of the Act.

15. The above violations are unfair labor practices that affects commerce within the meaning of Section 2(6) and (7) of the Act.

16. The Respondent has not violated the Act except as set forth above.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily terminated Tera Lopez must offer her reinstatement and make her whole for any loss of earnings and other benefits she suffered as a result of the discrimination against her from the date of the discrimination to the date of her reinstatement. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as provided in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Tera Lopez for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Hobson Bearing International, Inc., Diamond, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating or otherwise discriminating against any employee for engaging in protected concerted activities.

(b) Interrogating employees about their protected concerted activities; and interrogating them about their contact with the Board.

(c) Maintaining and reissuing and maintain an unlawful rule prohibiting employees from discussing their pay and, or bonuses.

(d) Distributing to employees, promulgating and maintaining an overbroad confidentiality agreement restricting employees from discussing or sharing confidential information, defined as including but not limited to, individuals' proprietary information; vital company information; and our information.

(e) Prohibiting employees from discussing their wages and other terms and conditions of employment, including disciplinary issues.

(f) Telling employees that they are required to sign agreements to abide by unlawful policies prohibiting employees from discussing their wages and threatening employees with termination if they violated them; and an overbroad confidentiality agreement prohibiting employees from discussing their terms and conditions of employment.

(g) Threatening to terminate employees for discussing their wages and other terms and conditions of employment.

(h) Prohibiting employees from discussing the termination of an employee.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Tera Lopez reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Tera Lopez whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful termination of Tera Lopez, and within 3 days thereafter notify Tera Lopez in writing that this has been completed and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Diamond, Missouri, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 14 Sub-region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pen-

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

dency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 16, 2015.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT terminate any employee for engaging in protected concerted activity, including contacting the Board agents.

WE WILL NOT prohibit employees from discussing their terms and conditions of employment, including wages and disciplinary issues.

WE WILL NOT interrogate employees about their protected concerted activities of contact with agents of the Board.

WE WILL NOT prohibit employees from discussing the termination of other employees.

WE WILL NOT maintain and reissue and maintain unlawful rules prohibiting employees from discussing their pay and, or bonuses.

WE WILL NOT maintain and distribute to employees overbroad and unlawful confidentiality agreements.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Tera Lopez the position at issue or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Tera Lopez whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful termination of Tera Lopez, and within 3 days thereafter notify Tera Lopez in writing that this has been completed and that she will not be retaliated against in any way.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate quarters.

WE WILL compensate Tera Lopez for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

HOBSON BEARING INTERNATIONAL, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/14–CA–156114 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.